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Omar Rodriguez, et al. v. Burbank Police Department, et al.
BC 414602
~~August 13~~, 2010
Dec. 2,
Motion of Defendant City of Burbank (including the Police Department of the City of Burbank) for Summary Judgment/Summary Adjudication of Issues

Plaintiff's Evidentiary objections to defendants' evidence are overruled. Defendant's evidentiary objections to plaintiff's evidence are ruled on as follows: Overruled: 1-6, 8, 10-12, 15-17, 24-25, 27, 30-35, 68, 70, 73-74, 118, 132-135, 147-148, 173-174, 176, 178-180, 183-184, 187-188, and 235-237. The remaining objections are sustained.

Defendant submitted a separate statement in reply referencing evidence. The summary judgment statute does not provide for a reply separate statement. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 249. The court has not considered defendant's reply separate statement. The court has considered defendant's reply brief, which violates CRC 2.104 and 3.113(d) (type size and spacing of briefs), but warns defendant that future briefs that do not comply with the rules will not be considered.

The motion for summary judgment is denied. The motion for summary adjudication of issues is granted as to the first, third and sixth causes of action and otherwise denied.

First cause of action -- discrimination. Defendant meets its initial burden of demonstrating that plaintiff suffered no adverse employment action and in any event that defendant had legitimate, nondiscriminatory reasons for taking the actions it did. Plaintiff fails to produce admissible evidence creating triable issues of fact.

"Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 1055. "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Thomas v. Dept. of Corrections* (2000) 77 Cal.App.4th 507, 511. Neither defendant's disbanding of the SED unit and defendant's refusal to return plaintiff to his former position as FTO constitutes an adverse employment action.

Even if defendant's disbanding of the SED unit constituted an adverse employment action, Defendant presents evidence of legitimate business reasons-namely budget, department needs and investigations into certain officers within the unit. (UF 44-49.) Once a legitimate business

reason is shown, an employee must demonstrate pretext via a showing of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions," beyond a showing that employer decisions were "wrong, mistaken, or unwise." *McRae v. Dept. of Corrections and Rehab.* (2006) 142 Cal.App.4th 377, 388. Plaintiff presents no admissible evidence that Defendant's reasons were a pretext for discrimination against him based on his ancestry. Even if the hearsay testimony of Taylor and Jose Duran were admissible, they contend only that they heard Chief Stehr provide other reasons for disbanding the SED unit. Plaintiff, however, provides no evidence that the disbanding of the SED unit was based on his ancestry. *Guz v, Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 360 361 ("The pertinent statutes do not prohibit lying, they prohibit discrimination.")

Plaintiff also fails to identify a triable issue that Defendant failed to return Plaintiff to his position as a FTO because of his ancestry. The parties do not dispute that there was only one position available at the time. (UF 61.) Plaintiff ranked number 3, but contends that he should have been ranked no. 1. (UF 60-61.) Plaintiff provides no evidence, other than his speculative opinion, that the person who eventually obtained the position did not deserve or was less qualified for the position.

Second cause of action -- harassment. Plaintiff submits sufficient admissible evidence to create a triable issue of fact as to whether he was harassed within the statute of limitations or within a period justified by the continuing violation doctrine.

Third cause of action -- retaliation. To state a prima facie case of FEHA retaliation, a plaintiff must show that (1) he engaged in "protected activity" by complaining to the employer of discrimination or participating in activities opposing the employer's practices reasonably believed to be unlawful under §12940, (2) the decision maker took an adverse employment action against plaintiff, and (3) the action would not have been taken but for the complaint. *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138. As explained above, two of the alleged adverse employment actions taken against plaintiff -- disbandment of the SED unit, and the failure to promote Plaintiff to a FTO position -- do not constitute adverse employment actions as a matter of law. The other adverse employment actions asserted by plaintiff -- Mike Parinello's appearance at plaintiff's deposition, Parinello's report of plaintiff's complaints of offensive conduct to Sgt. Misquez, Lt. Puglisi's email to Pat Lynch reporting that plaintiff was using an old citation book (which plaintiff admits), and Don Yadon's request that plaintiff not call Officer Cozaoks "the Greek" -- also do not rise to the level of adverse employment actions as a matter of law. Because plaintiff fails to provide evidence that he suffered an adverse employment action because he engaged in protected activity, his third cause of action for retaliation fails.

Fifth cause of action -- failure to prevent discrimination, harassment, and retaliation. Because plaintiff has identified triable issues of fact as to his harassment claim, his failure to prevent harassment claim survives summary adjudication. Gov't C. § 12940(k).) Section 12940(k); *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.

Affirmative Defense - Statute of Limitations on FEHA Claims. Plaintiff has identified triable

issues as to the applicability of the continuing violation doctrine to his harassment claim. Accordingly, the motion must be denied as to this defense.

Sixth cause of action (POBRA violation) and Affirmative Defense of Failure to Comply with Government Tort Claims Act. "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure." Government Code §3304(a). Plaintiff has admitted that he was never disciplined during his employment. (UF 64, 116, 120.) As explained above, plaintiff fails to raise a triable issue as to whether any adverse employment action was taken against him.

Plaintiff never filed a claim alleging any POBRA violation under the Government Claims Act. (UF 169.) Nothing in POBRA indicates that the Legislature intended to exempt POBRA from the Government Claims Act. *Lozada v. City and County of San Francisco* (2006) 145 Cal. App. 4th 1139, 1173. Accordingly, plaintiff is barred from pursuing this claim.

Plaintiff's claim that there have been other POBRA violations since the filing of the FAC, namely, an investigation by City Attorney Humiston, does not defeat summary adjudication of his POBRA claim. The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. Government Employees Ins. Co. v. Sup.Ct. (Sims) (2000) 79 Cal. App. 4th 95, 98. Plaintiff's new factual allegations raise new issues not pled in the FAC.

Seventh cause of action -- injunction. Because there are triable issues of fact as to plaintiff's harassment claim, plaintiff's claim for relief is proper.